



March 30, 2000

Mr. Joe De Los Santos
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2000-1233

Dear Mr. Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133477.

The Northside Independent School District (the "district"), which you represent, received a request for six items of information pertaining to a certain named individual. You state that you will release some of the requested information that you have identified as public information. Additionally, you assert that the information pertaining to the named individual's evaluations and appraisals are confidential pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, and you will not release that information.¹ You assert that the information concerning the named individual's alleged inappropriate behavior towards students and staff is excepted from disclosure under sections 552.026, 552.101, 552.114, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents contain information you contend qualifies as student records. You assert that sections 552.026 and 552.114 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA") except this information from public disclosure.

¹We note that section 552.301 of the Government Code requires a governmental body to ask for an attorney general's ruling if it wishes to withhold information and to submit that information to this office. The district has not submitted any teacher evaluations to this office for a determination of whether the district may withhold them.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We agree with your markings and have marked additional types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. Please note that you must redact the student's entire name, including the first initials. Additionally, the district must withhold in their entirety all handwritten documents created by students. *See* Open Records Decision No. 224 (1979) (student's handwritten comments would make identity of student easily traceable and such comments are therefore excepted by statutory predecessor to section 552.114). However, we note that the documents submitted contain an incident report from the district's police department. Incident reports created and maintained by a school's police department are not considered student records within the meaning of FERPA. *See* Open Records Decision No. 612 at 2 (1992). Therefore, the information relating to students within the incident report may not be withheld from public disclosure under FERPA or section 552.114 of the Government Code. Thus, the handwritten

material by the students within the incident report must be released with the names of the victims and witnesses redacted as discussed below.

Next, the district contends that the documents relating to allegations of, and investigation into, sexual harassment by the named individual are excepted from public disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The common law right of privacy is incorporated into the Public Information Act by section 552.101 of the Government Code. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685; Open Record Decision No. 611 at 1 (1992).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common law privacy to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

The district submitted documents representing investigations conducted by two separate schools within the district. We will address each investigation separately. The first set of documents pertaining to the investigation conducted at Northside Alternative Middle School do not contain an adequate summary of the investigation conducted. Furthermore, you do not relate that such a summary has been released. Therefore, the documents in this investigative file may not be withheld. However, based on *Ellen*, the district must withhold the identities of the victims and the witnesses from these documents before releasing them.

Next, we address the investigations conducted by the district into a separate allegation of sexual harassment of teachers at Leon Valley Elementary School and of an incident of sexual harassment of students off campus by the named individual. Initially, we note that the documents pertaining to these investigations also contain documents that relate to the teacher’s general treatment of students and not to allegations of sexual harassment.

Consequently, these documents must be released. We have marked the FERPA information that the district must redact prior to the release of these documents. Turning to the documents relating to the investigations into the allegations of sexual harassment, we find that these investigations do contain an adequate summary of the investigations and the district's recommendations based on those investigations. In this instance, pursuant to *Ellen*, the district may withhold the victims' and witnesses' statements in their entirety. The public's interest will be sufficiently served by the disclosure of the summary of the investigations and the statements of the individual accused of the misconduct. *Ellen*, 840 S.W.2d at 525. Therefore, under section 552.101 of the Government Code, the district must withhold from disclosure the remainder of the documents in the investigation file. The district must release the statements of the individual accused of the misconduct and the district's summary of the investigations of allegations of sexual harassment at the Leon Valley Elementary School and an incident of sexual harassment of students off campus. However, the victims' and witnesses' identifying information are protected by common law privacy and must be withheld from the summary and the accused individual's statements.

We note that the submitted documents contain information that may be excepted from public disclosure by section 552.117 of the Government Code. Section 552.117 excepts a public employee's home address, home telephone number, social security number, or information that reveals whether the employee has family members, when the public employee requests, under section 552.024, that this information be kept confidential. Therefore, section 552.117 requires you to withhold this information of a current or former employee or official who has elected under section 552.024 to keep this information confidential. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Therefore, if the employees have elected not to allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, we believe that the district must withhold this information from required public disclosure pursuant to section 552.117. We have marked the information that must be redacted under section 552.117 of the Government Code.

Lastly, you contend that section 552.131(b) of the Government Code excepts employees' identities as these employees are informers within the meaning of section 552.131. As added to chapter 552 of the Government Code by the Seventy-sixth Legislature, section 552.131 provides as follows:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.131.² Because the legislature limited the protection of section 552.131 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). As you have not informed us of any specific law or regulation that is reported to have been violated, we conclude that you may not withhold the employees' identities under section 552.131.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

²As of September 1, 1999, there were four sections of chapter 552 of the Government Code denominated as section 552.131. The quoted section 552.131 was added by the Act of May 30, 1999, 76th Leg., R.S., ch. 1335, § 6, 1999 Tex. Sess. Law Serv. 4543, 4545 (Vernon) (codified at Gov't Code § 552.131).

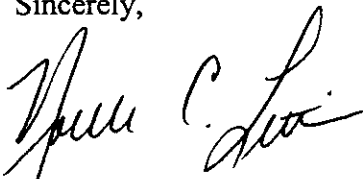
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Noelle C. Letteri", written in a cursive style.

Noelle C. Letteri
Assistant Attorney General
Open Records Division

ncl/nc

Ref: ID# 133477

Encl. Marked documents

cc: Mr. Billy M. Aldrich
Investigator
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027
(w/o enclosures)